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SUPREME COURT U.

No. 421.

In the
Supreme Court of the United States
October Term, 1921.

ALEXANDER KAHN, DONALD FISHER, ROBERT L.
LaCOCK *et al.*, *Appellants.*

VS.

WALTER F. ANDERSON, Warden of the United
States Penitentiary at Leavenworth, Kansas,
Respondent.

PETITION FOR RE-HEARING.

GEORGE N. KELLY,
WILLIAM BUCHHEITZ,
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Attorneys for Appellants.

In the
Supreme Court of the United States

October Term, 1921.

ALEXANDER KAHN, DONALD FISHER, ROBERT L.
LeCOCQ *et al.*, *Appellants.*

vs.

AUGUST V. ANDERSON, Warden of the United
States Penitentiary at Leavenworth, Kansas,
Respondent.

No. 421.

PETITION FOR RE-HEARING.

*To the Honorable Supreme Court of the
United States:*

The appellants respectfully state that the opinion of this Honorable Court and the judgment rendered by this court in this case on the 31st day of January, 1921, affirming the judgment of the trial court, which court dismissed appellants' peti-

tion for a writ of habeas corpus, is based upon certain misconceptions of the facts contained in the transcript of the record herein, and of the law applicable to those facts as hereinafter more fully appears.

The opinion of this court contains the following recital:

"The petition for habeas corpus filed by the appellants on *June 11, 1920*, to obtain their release from confinement in the United States *Disciplinary Barracks* at Leavenworth, having, on motion of the United States, been dismissed on the face of the petition *and documents annexed*, the appeal which is now before us was prosecuted. We are therefore only concerned with the issues which legitimately arise from that situation."

The record (Rec. 13) shows that the petition for the writ was filed on April 14, 1920, and not on June 11, 1920, as the opinion recites. The petition also discloses that appellants did not seek their release "from confinement in the United States Disciplinary Barracks," but from "the *United States Penitentiary*, at Leavenworth, Kansas" (Rec. 2), where they are held by the warden of said Penitentiary.

If the decision of the court upon the issues involved be correct, then the misrecital of the facts contained in the foregoing paragraph was not prejudicial to the appellants, but we direct the attention of the court to these errors for the reason that they are merely evidence that this case has not been considered by the court sufficiently to

enable it to grasp the real point made by the appellants, which is that the phrase "time of peace" in the 92nd Article of War, since it deals with the jurisdiction of both civil and military courts, should be held to mean what it has been held by the courts to mean from time immemorial, to-wit: *"If the courts are open it is a time of peace."* We think the seriousness of the question involved would at least justify the court in again carefully reading the record and brief of appellants.

The opinion also contains the following recital:

"The release which was prayed was based upon the following grounds: (1) Alleged illegality in the constitution of the court; (2) an assertion that the petitioners did not possess the military status essential to cause them to be subject to the court's jurisdiction; (3) that their subjection, even if they possessed such military status, to be tried by court-martial, deprived them of asserted constitutional rights, and (4) that in no event had the court-martial power to try them for murder under the conditions existing at the time of the trial."

The said recital in the opinion fails to disclose that the release prayed for was based upon the following ground, which was the *only jurisdictional question raised before the court-martial*.

"* * * that your petitioner, Francis J. Cooney, who was a drafted soldier at the time he became a general prisoner objected to the jurisdiction of said court-martial on the

ground that the 92nd Article of War prohibited the trial of any person by court-martial for murder committed within the geographical limits of the states of the Union in time of peace and that it *was a time of peace in the State and District of Kansas* and within the geographical limits of the United States on the 29th day of July, 1918; that all of your petitioners concurred in said objection to the jurisdiction of said court-martial; that said plea to the jurisdiction was then and there overruled by said court-martial. (Rec. 5.) * * *

Your petitioners further state that the courts of the United States in the District of Kansas and throughout the United States and the courts of the State of Kansas and the several states, *were, on the 29th day of July, 1918, and since have been and now are open and engaged in the free and uninterrupted and prompt administration of justice and that said 29th day of July, 1918, was a time of peace in the said State and District of Kansas* and within the geographical limits of the States of the Union and District of Columbia.

And your petitioners state that the rights of your petitioners under the 92nd Article of War, which provides that no court-martial shall have jurisdiction to try any person for murder committed within the geographical limits of the States of the Union and the District of Columbia, *in time of peace*, have been violated by the said trial conviction and sentenced on said charge of murder." (Rec. 11.)

The principal contention made by the appellants not only before the court-martial, but before

the trial court and this court, was that on July 29, 1918, it was a *time of peace within the state and district of Kansas for the reason that the courts were open*. This, the main ground, was wholly ignored in the opinion.

And appellants respectfully state that the opinion of this court in this cause contains the following recital:

"The order assigning the retired officers to the court is within the authority conferred by the Act of April 23, 1904, c. 1485, 33 Stat. 264, which provides that the 'Secretary of War may assign retired officers of the Army, with their consent, to active duty upon courts-martial.'"

The said recital, in connection with the recital in the opinion, holding that it was not a time of peace in the state and district of Kansas is in direct conflict with the provisions of the Manual of Courts-martial, by virtue of which courts-martial are governed in the exercise of their jurisdiction and are governed with respect to the qualification of their members as shown by Clause 9 of Section II, of said Manual of Courts-martial, subdivision b, which is as follows:

"(b). A retired officer may be assigned with his consent to active duty upon courts-martial *in time of peace* (act of April 23, 1904, 33 Stat. 264), and if employed on active duty in time of war in the discretion of the President (Sec. 24, Act of June 3, 1916, 39 Stat. 183), he is eligible for court-martial duty. At other times he is not available for

such duty except that when placed in command of a post under the Act of August 29, 1916 (39 Stat. 627), or when assigned to recruiting duty he may act as summary court-martial when he is the only officer present."

If it was a time of peace the retired officers were qualified if they were assigned to duty on the general court-martial with their consent; if it was a time of war then it was a condition precedent to their having been assigned to duty on the court-martial that they were employed on active duty before being so assigned and this fact should have appeared from the face of the record. But the recital in the opinion, asserting that the order assigning the retired officers to the court was within the authority conferred by the Act of Congress in question, is in *direct conflict* with the provisions of the court-martial in which it is expressly stated that a retired officer may be assigned with his consent upon courts-martial *only in time of peace*. When taken in connection with the last sentence of the above quotation to the effect that "at other times he is not available for such duty, except that when placed in command of a post under the act of August 29, 1916, 39 Stat. 627, or when assigned for recruiting duty he may act as summary court-martial when he is the only officer present the error is made more manifest." The Act of Congress gives the President power to promulgate the manual for courts-martial, and hence its provisions control the disposition of this cause as much as the act authorizing its promulgation and the very existence of courts-martial.

We therefore respectfully submit that if it was a time of peace for the purpose of qualifying the retired officers, it was also a time of peace for the purpose of depriving the court-martial of jurisdiction to try appellants on a charge of murder, and hence since the decision and opinion herein conflict with both reason and authority, this petition for rehearing should be sustained and the judgment reversed.

And of the matters and things herein contained appellants pray the judgment of the court.

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Attorneys for Appellants.

Suggestions in Support of Petition for Re-Hearing.

I.

It was the function of this court on the record before it to determine whether or not the appellants committed the alleged crime during a time of peace in the State and District of Kansas, to-wit, on the 29th day of July, 1918, as a question of fact and not to permit the political department of the government to determine that question for the court.

The rule followed by the English and American courts from the time of the decision in Lancaster's case, 1st St. Tr. 39, to the time of the decision of the case of *Caldwell v. Parker*, 252 U. S. 376, in cases where the test of the jurisdiction of a court

to try a man for his life was dependent upon whether or not it was a time of peace or war, has always been determined as a *question of fact* and not as a *political question*.

In Vol. 3, Thomas Ed. Coke's 1st Int., pages 39, 40, 41, it is said:

"And, therefore, when the courts of justice be open, and the judges and ministers of the same may by law protect men from wrong and violence and distribute justice to all, it is said to be time of peace. So when, by invasion, insurrection, rebellions or such like, the peaceable course of justice is disturbed and stopped so as the courts of justice be, as it were, shut up, *et silent leges inter arma*, then it is said to be time of war. And the trial hereof is by the records, and judges of the courts of justice; for by them it will appear whether justice had her equal course of proceeding at that time or no."

II.

The test applied by the courts of England and the United States from the year 1327 to the time of the decision of *Caldwell v. Parker*, 252 U. S. 376, in April, 1920, to determine whether or not it was a time of peace or war, was whether or not the courts were open and able to administer justice, and if they were, then if the jurisdiction of a military court was dependent upon the existence of the one state or the other, the military court could not exercise any jurisdiction if the civil court could function.

In Lancaster's case, 1st St. Tr. 39, the judgment of a military tribunal was reversed and the

confiscated estate of a deceased soldier returned to his heirs for the reason that the sentence of the military tribunal which deprived him of his life and property was imposed in England at a time when the courts were open. Thus:

"* * * and so, without arraignment and answer, the said Thomas erroneously and against the law of the land, *in time of peace*, was sentenced to death; by reason whereof, because it is notorious and manifest that the whole time in which it was charged against the said Earl, that he committed the aforesaid offenses and crimes in the aforesaid record and proceeding contained, and also the time when he was taken, and when the said lord the king's father, etc., caused it to be recorded that he was guilty, and when he was sentenced to death, *was time of peace*; in particular because throughout the whole time aforesaid, the chancery and other places of the courts of the lord the king, were open, and in them law was done to every one as it used to be done; * * * the aforesaid lord, the king's father, etc., ought not, in such time of peace, to have caused such record to be made against the said Earl, nor to have sentenced him to death, without arraignment and answer: Also, he says, that there is error in this, that whereas the aforesaid Earl Thomas was one of the peers and great men of this kingdom, and in the Great Charter of the Liberties of England it is contained, that no free-man shall be taken, imprisoned, or disseised of his freehold or franchise, or his free customs, or outlawed or banished, or in any manner destroyed, nor shall the lord, the king, by himself or others, proceed against him, but by the lawful judgment of his peers,

or by the law of the land, the earl Thomas was by the record of the lord the king as aforesaid, *in time of peace*, erroneously sentenced to death without arraignment or answer, or the lawful judgment of his peers, against the law, etc., and against the tenor of the aforesaid Great Charter."

It will be observed that in that case it was held that it was a *time of peace* because "the chancery and other places of the courts of the lord, the king, were open, and in them law was done to everyone as it used to be done."

The same rule was applied in Strafford's case, 3 St. Tr. 1,382.

In *Coleman v. Tenn.*, 97 U. S. 509, in construing the Article of War giving courts-martial jurisdiction to try soldiers for murder in time of war, this court held that said Article of War did not operate to give a court-martial jurisdiction to try a soldier for such crime in any case where in the territory in which the court-martial was sitting "the civil courts were open and in the undisturbed exercise of their jurisdiction." (p. 515.)

In Vol. III, Thomas Ed. Coke's 1st Inst., p. 39, 40, 41, it is said:

"First, it is necessary to be known what shall be said to be time of peace, *tempus pacis*; and what shall be said *tempus belli sive guerrae*, time of war. *Tempus pacis est quando cancellaria, et aliae curiae regis sunt apertae, quibus lex fiebat cuicunque prout fieri consuevit.* And so it was adjudged in

the case of Roger Mortimer, and Thomas, Earl of Lancaster. *Utrum terra sit guerrina necne, naturaliter debet judicari per recorda regis, et eorum, ut curias regis per legem terrae custodiunt, et gubernant, sed non alio modo.*

And, therefore, when the courts of justice be open, and the judges and ministers of the same may by law protect men from wrong and violence and distribute justice to all, it is said to be time of peace. So when, by invasion, insurrection, rebellion, or such like, the peaceable course of justice is disturbed and stopped, so as the courts of justice be, as it were, shut up, *et silent leges inter arma* then it is said to be time of war. And the trial hereof is by the records, and judges of the courts of justice; for by them it will appear whether justice had her equal course of proceeding at that time or no."

In *The Parkhill*, 18 Fed. Cas., p. 1187, it is said:

"The rule of the common law is that, when the regular course of justice is interrupted by revolt, rebellion, or insurrection; so that the courts of justice cannot be kept open, civil war exists, and the hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land. The converse is also regularly true; *so when the courts of a government are open it is ordinarily a time of peace.*
* * * The marshal of the United States, in order to keep the peace of his judicial district, and enable him to execute the process of the courts, may arm himself and his deputies, and may also call in the aid of a

warlike force. Y. B. 3, Hen. VII, Pl. 1; 5 Coke 72a; Br. Riots, pl. 2; Dall., c. 95; 8 Watts & S., 191; 5 C. & P., 254, 282. When he cannot, by such means, keep the peace in his district, and the courts in it no longer can direct the process to his, a state of war exists."

This court in *Ex Parte Milligan*, 4 Wall., l. c. 128, cited the decision in the Lancaster case with approval. Thus:

"— in the time of peace no man ought to be adjudged to death for treason or any other offense without being arraigned and held to answer and that regularly *when the King's courts are open it is a time of peace in judgment of law.*"

Lancaster was a soldier in the service of his King and country and was guilty of rebellion, but notwithstanding his trial and conviction by court-martial was solemnly denounced by the great court of the realm as illegal. The chief justice, concurring in the Milligan case, said:

"Where peace exists, the laws of peace must prevail."

In *Griffin v. Wilcox*, 21 Ind. 370, l. c. 378, Coke's definition has been cited with approval, where it is said:

"When the courts of justice be open and the judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all, *it is said to be*

time of peace. So when by invasion, insurrection, rebellion or such like, the peaceable course of justice is disturbed and stopped, so as the courts be as it were shut up, *et silent inter leges arma*, then it is said to be time of war. Coke upon Littleton, as quoted in Law, Wheat. Int. Law, p. 525."

In the Prize Cases, 67 U. S. 635, it was held that the question as to whether or not it was a time of peace or war was to be determined as a question of fact and not to be determined by asking the political department of the government whether or not it was a time of peace or war. Thus:

Syll. 5. "A state of war may exist without any formal declaration of it by either party, and this is true both in civil and foreign wars."

Syll. 6. "A civil war exists and may be prosecuted on the same footing as if those opposing the government were foreign invaders whenever the regular course of justice is interrupted or disturbed by rebellion or insurrection so that the courts cannot be kept open."

Peace existed in the State and District of Kansas on July 29, 1918. Why does the principle not apply that "where peace exists the laws of peace shall prevail"?

III

The construction placed upon the 92d article of war in the opinion herein is in violation of

the principle heretofore recognized by this court that no intention should be ascribed to Congress to interfere with the regular administration of the justice in the civil courts in the absence of clear and direct language to that effect.

The decision herein is directly contrary to the principle enunciated in *Coleman v. Tennessee*, 97 U. S. 509, and categorically approved in *Caldwell v. Parker*, 252, U. S., 1. c. 385, where it is said:

“With the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts, no such intention should be ascribed to Congress in the absence of clear and direct language to that effect.”

The opinion herein construing the 92d Article is directly contrary to the opinion of the court in *Caldwell v. Parker*, *supra*, where the court said, 1. c. 386:

“But the act did not purport to increase the general powers of court-martial by defining new crimes or by placing enumerated offenses within the category of military crimes as defined from the beginning, as we have already pointed out, but simply contemplated endowing the military authorities with power not to supplant, but to enforce the state law. As observed by Winthrop in his work on military law, 2nd Ed., page 1033, it was intended to provide through the military authorities means of enforcing and punishing crimes against state law committed by persons in military service, as the result of the existence of martial law or of military opera-

tions the courts of the state were not open and military power was therefore needed to enforce the state law. And it was doubtless this purpose indicated by the text to which we have already called attention which caused the court in Coleman case to say that the statute had no application to territory where 'the civil courts were open and in the undisturbed exercise of their jurisdiction'". (p. 515.)

IV.

The opinion herein is based upon the theory that the appellants conceded that if the armistice had not been signed on November 11, 1918, the court would have had jurisdiction and it erroneously disposes of the appellant's real contention concerning this question by ignoring it.

The opinion of this court is based upon the idea that the appellants conceded that if the armistice had not been signed on November 11, 1918, the court would have had jurisdiction.

The opinion recites:

"This brings us to the final contention that because when the trial occurred it was a time of peace no jurisdiction existed to try for murder * * *. That complete peace in the legal sense had not come to pass by the event of the armistice and the cessation of hostilities is not disputable."

The foregoing quotation discloses that this court overlooked the real question in this case.

Apparently without reflection it applied the rule quoted by this court in *McElrath v. United States*,

102 U. S. 426 (where no question of jurisdiction of a court was involved), and announced in *U. S. v. Anderson*, 9 Wall 71, and in the *Protector*, 12 Wall 102, to the effect that for the purpose of determining property rights such as statutes of limitations and the right of an officer in the navy to draw his pay or to have discipline meted out to him by one arm of the executive government or another, such as by the President or his creature, a general court martial, that the phrase "time of peace" meant a time in which there was official recognition of that status.

The court in the *Protector*, 12 Wall 700, held:

Syll. 1. "The beginning and termination of the late rebellion in reference to acts of limitation is to be determined by some public act of the political department."

In *U. S. v. Anderson* the question as to when the abandoned or captured property rights act intended to be setured by the phrase "suppression of the rebellion" was to be regarded as having taken place at the time of the President's proclamation declaring that the rebellion had ended.

In none of those cases was any question of the jurisdiction of a court or tribunal involved. Article 92 is manifestly not an article of a disciplinary variety, but it is an article enacted for the purpose of inflicting punishment upon criminals who violate the ordinary laws of the land and *expressly providing for the jurisdiction of the courts* in which the trial shall be held. There is no

analogy between the statute authorizing the executive arm of the government to dismiss an officer for a breach of discipline and the jurisdiction of a court to try him for his life because of a violation not of a disciplinary rule, but because of his violation of one of the ordinary laws of the land made for the protection of society in general.

As pointed out in our brief, we submit that the phrase "time of peace" ought not where the lives and liberties of citizens are involved, receive a construction contrary to that which has been recognized for ages. To reiterate, the phrase "time of peace" with reference to the power of a military tribunal to deprive either a soldier or citizen or civilian of his life from the year 1322 until the opinion promulgated by this court has ever been defined to mean a time when the courts are open and able to administer justice.

V.

This court has decided in the opinion herein that for the purpose of qualifying the retired army officers who sat on the court-martial, it was a time of peace and for the purpose of giving the court-martial jurisdiction that it was not a time of peace but was a time of war and therefore the opinion is contradictory and not in accordance with the law. The opinion is a judicial paradox.

Clause 9 of Section 11 of the Manual of Courts-martial, subdivision b, provides:

"(b) A retired officer may be assigned with his consent to active duty upon courts-martial *in time of peace* (act of Apr. 23,

1904, 33 Stat. 264), and if employed on active duty in time of war in the discretion of the President (Sec. 24, Act of June 3, 1916, 39 Stat., 183), he is eligible for court-martial duty. At other times he is not available for such duty except that when placed in command of a post under the act of August 29, 1916 (39 Stat., 627), or when assigned to recruiting duty he may act as summary court-martial when he is the only officer present."

In the opinion the court has said that the President had authority to appoint the retired officers because "the order assigning the retired officers to the court is within the authority conferred by the Act of April 23, 1904, c. 1485, 33 Stat. 264, which provides that:

"The Secretary of War may assign retired officers of the Army, with their consent, to active duty * * * upon courts-martial * * *"

According to the Manual of Courts-martial the President did not have authority to order the retired officers to sit upon courts-martial except with their consent in *time of peace*. Unless it was a time of peace, therefore, the court-martial was not properly constituted. If it was a time of war the retired officers were not qualified.

Conclusion.

We respectfully request the court to examine what is said in appellants' brief from pages 83 to 106 concerning the meaning of the phrase "time of peace" in connection with its consideration of the petition.

Respectfully submitted,

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